Supreme Court, U.S.
FILED
SEP 28 1998
OFFICE OF THE CLERK

No. 98-312

In The

Supreme Court of the United States

October Term, 1997

HARRY BENION and PATRICIA BENION,

Petitioners,

v.

BANK ONE, DAYTON, N.A.; ECHO ACCEPTANCE CORPORATION; and SUPERIOR SATELLITE, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CRAIG A. VARGA*
NORMAN B. BERGER
RACHEL A. HART
VARGA BERGER LEDSKY HAYES & CASEY
224 South Michigan Avenue, Suite 350
Chicago, IL 60604
(312) 341-9400

Counsel for Respondents Bank One, Dayton, N.A. and Echo Acceptance Corporation

**Counsel of Record*

STEVEN ALAN BENNETT
DAVID W. CARPENTER
BANC ONE CORPORATION
100 East Broad Street
Columbus, OH 43271
(614) 248-6031

Counsel for Respondent Bank One, Dayton, N.A.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that the factual record before it demonstrated that a lender's private label credit card plan "reasonably contemplated repeated transactions" so as to meet the applicable test for "open-end credit" under the Truth-in-Lending Act and Federal Reserve Board Regulation Z?

PARTIES TO THE PROCEEDING

Respondent Bank One, Dayton, N.A. has been succeeded in interest by Bank One, N.A. The following is the parent company of Bank One, N.A.: Banc One Corporation. The following are the only non-wholly owned subsidiaries of Bank One, N.A.: Banc One Payment Services, L.L.C; Integrion Financial Network, L.L.C.

The following is the parent company of respondent Echo Acceptance Corporation: EchoStar Communications Corp.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

REGULATIONS INVOLVED 1

Federal Reserve Board Official Staff Commentary on Regulation Z, 12 C.F.R. Pt. 226, Supp. I § 2(a)(20)(3) .....

REASONS FOR DENYING THE WRIT 2

A. This Case Turns On Its Facts And Not The Law 2

B. No "Conflict Among The Circuits" Exists, Nor Does Any Conflict Exist Between The Rule Of Law Employed By The Seventh Circuit And That Of Any Other Court 9

C. The Petition's Alleged Basis For Review Amounts Only To Disenchantment With The Seventh Circuit's Interpretation Of A Federal Statute And Its Implementing Regulation 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

STATUTE CITED

15 U.S.C § 1601 *et seq.* 2

REGULATIONS CITED

12 C.F.R. § 226.2(a)(20)(i) 1, 3

Federal Reserve Board Official Staff Commentary on Regulation Z, 12 C.F.R. Pt. 226, Supp. I § 2(a)(20)(3) 1, 3, 4

REGULATIONS INVOLVED

Federal Reserve Board Official Staff Commentary on Regulation Z, 12 C.F.R. Pt. 226, Supp. I § 2(a)(20)(3)

* * * * *

2(a)(20) Open-end credit.

* * * * *

3. Repeated transactions. Under this criterion, the creditor must reasonably contemplate repeated transactions. This means that the credit plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time credit extension. The creditor must expect repeated dealings with consumers under the credit plan as a whole and need not believe a consumer will reuse a particular feature of the plan. The determination of whether a creditor can reasonably contemplate repeated transactions requires an objective analysis. Information that much of the creditor's customer base with accounts under the plan make repeated transactions over some period of time is relevant to the determination, particularly when the plan is opened primarily for the financing of infrequently purchased products or services. A standard based on reasonable belief by a creditor necessarily includes some margin for judgmental error. The fact that particular consumers do not return for further credit extensions does not prevent a plan from having been properly characterized as open-end. For example, if much of the customer base of a clothing store makes repeat purchases, the fact that some consumers use the plan only once would not affect the characterization of the store's

plan as open-end credit. The criterion regarding repeated transactions is a question of fact to be decided in the context of the creditor's type of business and the creditor's relationship with its customers. For example:

i. It would be more reasonable for a thrift institution chartered for the benefit of its members to contemplate repeated transactions with a member than for a seller of aluminum siding to make the same assumption about its customers.

ii. It would be more reasonable for a financial institution to make advances from a line of credit for the purchase of an automobile than for an automobile dealer to sell a car under an open-end plan.

* * * * *

REASONS FOR DENYING THE WRIT

A. This Case Turns On Its Facts And Not The Law.

This fact-intensive case concerns whether the credit card financing program established by Bank One, Dayton, N.A. ("Bank One") for consumers' purchase of satellite dishes, consumer electronics equipment, other related accessories and periodically renewable television programming packages – all distributed by "EchoStar" dealers – was properly structured as an "open-end" revolving credit plan. Only *one* of the three requirements for a plan qualifying as "open-end credit" under Regulation Z – the Rule promulgated by the Federal Reserve Board to implement the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA") – is even at issue in the case. That

requirement provides that the plan be one in which "[t]he creditor reasonably contemplates repeated transactions." 12 C.F.R. § 226.2(a)(20)(i).

The Federal Reserve Board, in its Official Staff Commentary to Reg. Z, 12 C.F.R. Part 226, Supp. I, notes that "[t]he criterion regarding repeated transactions is a question of fact to be decided in the context of the creditor's type of business and the creditor's relationship with the consumer." *Id.*, § 2(a)(20)(3). Creditors are accorded some leeway, the Federal Reserve Board also notes, for "[a] standard based on reasonable belief by a creditor necessarily includes some margin for judgmental error." *Id.* The issue of Bank One's compliance with TILA focuses, therefore, on whether *facts exist* to demonstrate that Bank One "reasonably contemplated repeated transactions."

The Petition's Statement of the Case neglects to even mention, much less detail, the exhaustive evidentiary record developed in the district court and essential to that Court's grant, and to the Seventh Circuit's affirmance, of summary judgment for Bank One and Echo Acceptance Corporation ("Echo") on the claims at issue. The Petition likewise offers no description whatsoever of the comprehensive factual findings underpinning both the district court's ruling and Judge Posner's decision on behalf of a unanimous appellate panel. Instead, the Petition focuses on details about the Benions' purchase of their satellite

dish and its alleged defectiveness (Pet 10),[1] both of which are irrelevant to this Court's review. The Benions also briefly describe *their* legal contentions in the courts below and mention, in barest conclusory fashion, that both lower courts have ruled against them (Pet. 10-11).

While the Petition ignores the evidentiary record, the courts below ~~did not~~ – they reviewed it, observed that it was almost wholly undisputed and discussed it in detail in their opinions below. Their respective summary judgment decisions are predicated upon it. Although essential to a fair characterization of this case's central issue and to understanding the basis for the decisions below, brevity does not permit recitation of the record facts in the same detail as they were developed in the district court and discussed there and in the Seventh Circuit. Excerpts from those courts' findings are nevertheless highly illustrative of the courts' assessments of the record. In that regard, the district court stated that:

> In considering whether repeated transactions are likely, we are to consider the nature of the creditor's business and the relationship between the creditor and the consumer. *Id.* [12 C.F.R. Pt. 226, Supp. I, § 2(a)(20)(3)]. Here, the relevant "business" is that of the Echo-approved retailers, which provide the only places that an EchoStar credit card may be used. These retailers sell a variety of consumer electronics;

---

[1] References to the Petition for A Writ of Certiorari ("the Petition") will be made as follows: (Pet. ___). References to the opinions of the courts below, which are contained in the "Appendix" to the Petition, will be made as follows: App. ___.

although the product line that is most important for the Plan's purposes is satellite-related products and programming, the retailers generally sell other popular audio video equipment including televisions, VCRs, and stereo equipment. Echo and its dealers also sell satellite television programming, another product that must be bought or renewed at regular intervals. Because these dealers carry a wide array of products that are appealing to consumers, as well as television programming that regularly expires and must be renewed, we find that the nature of the business supports the hypothesis that repeat sales are likely. The relationship between the creditor/retailers and the consumer also makes repeat sales likely: although it is certainly possible that a consumer who buys something at an Echo-approved dealer will never enter those doors again, it is not unreasonable to suppose that a consumer visits a particular retailer because it is conveniently located, has good products or prices, or for some other reason that would remain equally valid over time. The number and accessibility of Echo-approved dealers – over 750 dealers across the country – also affects the likelihood of future purchases under the Plan, since consumers who relocate may still be able to use the Plan credit card to make purchases.

The Household Retail[2] sales data also support Bank One's judgment that repeat credit sales were sufficiently likely to warrant adopting an

---

[2] "Household Retail" refers to an entity which Echo had contracted with previously to provide open-end credit financing for consumers' purchases of satellite dish, consumer electronic products, and programming packages.

open-end plan. The data showed repeat sales of between 12 and 17 percent of total sales [footnote omitted]. While these figures are not overwhelming evidence that repeat sales were likely under Bank One's similar Plan, they do not make it unreasonable as a matter of law to structure the Plan as open-end rather than closed-end credit. This conclusion is buttressed by Regulation Z's requirement that creditors be given some leeway for judgmental error in predicting the likelihood of repeated transactions.

Finally, although this factor standing alone would not be persuasive, Bank One was not unreasonable in taking its own plans to aggressively encourage repeat purchases into account in deciding whether repeat sales were likely. Bank One set up marketing plans, including the use of inserts in its monthly statements to EchoStar credit card holders, that appear to have been genuinely calculated to produce future purchases. The results since the EchoStar Plan was initiated demonstrate that repeat sales in fact occur: over 20% of the Plan's active accounts have been used for repeat purchases.

The plaintiffs do not argue with these facts, although they do dispute the weight to be assigned them.

App. 20-22.

* * * * *

Fairly summarized, the submissions show that Bank One viewed repeat sales as a goal of the Plan, and genuinely believed that the credit card would encourage repeat sales to a relatively captive consumer base.

App. 14.

The Seventh Circuit focused on many of the same facts in affirming the district court, observing that:

> It is beyond contestation that the bank (the only Truth in Lending defendant) hoped and expected, and *reasonably* expected, to have at least some repeat transactions with the holders of the EchoStar card. The card was usable at any dealer in a nationwide chain of dealers. Bank One had an aggressive marketing strategy designed to promote repeat purchases, which was very much in its financial self-interest. The bank had studied the performance of EchoStar's financing plan in an earlier incarnation and had obtained statistics which showed that repeat purchases had been an increasing fraction of total purchases under the plan. And, although we must not confuse hindsight with foresight, what actually happens is some evidence of what was reasonably expected to happen, and so it is relevant though not determinative to note that 20 percent of all holders of the EchoStar card issued by Bank One who used the card at least once (some never used it) made one or more additional purchases with the card after the initial purchase. The Benions bought only one year's worth of programming; it was likely that they would use the card to buy programming for the next year.
>
> App. 4.
>
> * * *
>
> Since EchoStar's principal product is satellite dishes, it is natural that it should want to condition the extension of credit on the purchase of a dish. This is consistent with a reasonable expectation that the holder of the card will use it to

> buy other things as well – the goods and services that are complements to the dish in the economic sense and so enhance its value. All the facts alleged by the plaintiffs are consistent with an expectation of repeat purchases.
>
> App. 8.

That the Benions found none of these facts, nor the lower courts' assessments of them, important enough to even be *mentioned*, is all the more significant when set against the Benions' contention that "the Seventh Circuit unilaterally abdicated its task, declaring that it preferred to wait for an amendment to the statute or regulations before consenting to decide a case involving these issues." (Pet. 23). The Benions would have this Court believe that the Seventh Circuit's "position [was] that it cannot decide this case." (Pet. 25).

This suggestion that the Seventh Circuit did not actually assess the facts in the record and measure them against the applicable legal standard is incorrect and seriously misleading. As is evident from the quotations above, both the Seventh Circuit and the district court made extensive factual findings – ones rendered all the more decisive by the Benions' inability or failure to contest what was a well-developed evidentiary record. While the Benions' accusation of "abdication" is, to say the least, "inventive" as a proffered basis for certiorari review – *i.e.*, the Seventh Circuit "refused" to hear the case and, apparently, committed a gross miscarriage of justice – it is wholly fanciful and, in the end, absolutely telling about the barrenness of the Petition's articulation of any basis for review.

B. No "Conflict Among The Circuits" Exists, Nor Does Any Conflict Exist Between The Rule Of Law Employed By The Seventh Circuit And That Of Any Other Court.

The Seventh Circuit was "unable to find any appellate decisions" on the issue presented. App. 1. The Petition does not allege any conflict between circuits, nor can the Benions point to one. Apart from the case being one of first impression for the courts of appeals, the decision below does not conflict with any district court decisions. Although the district court observed that in several different cases involving other credit plans, other district courts had denied creditors' summary judgment motions, "those cases are distinguishable . . . , as the evidentiary records there were far less developed than the present case." App. 23. In other words, those cases did not involve a different legal standard or rule of law than the "reasonable expectations" standard applied by the Seventh Circuit; they simply involved facts that, from the creditors' standpoint, were less favorable, or less favorably developed.

If, as the Benions forecast, creditors will run wild with alleged abusive open-end lending now that the Seventh Circuit has "put [Judge Posner's] seal of approval on prevailing practices in the private label credit card industry" (Pet. 14), there should be plenty of opportunities for district courts (both in and outside the Seventh Circuit) to consider other credit plans, each on its own facts, and to "take what they will" from the Seventh Circuit's decision about Bank One's EchoStar plan. Application of the proper rule of law – the "reasonable expectation of

repeated transactions" test – to the myriad factual situations posed by differing credit plans, designed for differing products, may well produce a variety of different results by different fact finders. However, until another court of appeals enunciates a different legal standard by which to measure those other plans, there can be no suggestion of a "conflict" – whether "real" or otherwise.

C. The Petition's Alleged Basis For Review Amounts Only To Disenchantment With The Seventh Circuit's Interpretation Of A Federal Statute And Its Implementing Regulation.

The Petition never really offers a clear statement of how or why it is "certworthy." Once one gets past the outlandish assertion (Pet. 25) that the Seventh Circuit "refused" to assess the record against the "reasonable expectation" standard and to "decide the case," most of the rest of the Petition appears to argue that the Seventh Circuit was "wrong" in viewing the law differently than the Benions would have liked.

TILA and Reg. Z indisputably require that open-end credit be assessed from the standpoint of a creditor's "reasonable expectation of repeated transactions." It is also indisputable that the Seventh Circuit and the district court applied this rule, reviewing such factual matters as the type of goods sold, availability of dealers, marketing plans, plan operational documents, profit expectations and statistical data. What the Benions have been unhappy about throughout the case, though, has been the district court's and the Seventh Circuit's unwillingness to adopt the odd gloss which the Benions seek to have "read into"

the current TILA test. The Benions have wanted both courts to say that there can be no "reasonable expectation" if less than 50% of all sales are "repeat transactions" or if the first item purchased under the plan is a "big ticket" one.

While a Respondent's Brief in Opposition is not designed to address the merits, it should be noted that:

a. The Seventh Circuit emphatically rejected the Benions' positions as involving "a series of leaps!," App. 7, and as an attempt to exalt a statement in a committee report at the expense of the language of TILA, Reg. Z and the Federal Reserve Board's Official Staff Commentary;

b. The district court rejected such positions as not reflective of "the law as it is written," App. 11;

c. Both the Seventh Circuit and the district court stated that any "fine-tuning" of TILA, with respect to open-end credit, involves policy questions that are best considered by Congress or by the Federal Reserve Board, given the latter's specialized expertise and statutory directive to oversee consumer credit disclosures, App. 6-8, 11;

d. The Federal Reserve Board, during pendency of the *Benion* appeal, proposed *but later withdrew*, citing the need for further public comment, changes to the Official Staff Commentary which might have been viewed by the Benions as being more to their liking. App. 6.

Rather than serving as a request to "decide an important issue of federal law," the Petition really asks this

Court to sit as a "super-legislature." Complex policy judgments, however, in an area of the law already marked by a detailed and often amended scheme of statutory and regulatory requirements, should more appropriately be left to legislative or regulatory forums.

CONCLUSION

For the reasons outlined above, the Petition should be denied.

Dated: September 28, 1998

Respectfully submitted,

CRAIG A. VARGA*
NORMAN B. BERGER
RACHEL A. HART
VARGA BERGER LEDSKY
HAYES & CASEY
224 South Michigan Avenue
Suite 350
Chicago, IL 60604
(312) 341-9400

Counsel For Respondents
Bank One, Dayton, N.A. and
Echo Acceptance Corporation

STEVEN ALAN BENNETT
DAVID W. CARPENTER
BANC ONE CORPORATION
100 East Broad Street
Columbus, OH 43271
(614) 248-6031

Counsel For Respondent
Bank One, Dayton, N.A.

**Counsel of Record*